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No. 91-1141

In the Supreme Court of the United States

OCTOBER TERM, 1991

ROBYN PRICE AND ROBERT CARTER, PETITONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction over an appeal from an *in rem* forfeiture proceeding after the *res* was removed from the court's jurisdiction.

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. A1-A4) and the district court (Pet. App. A6-A20) are unreported.

JURISDICTION

The judgment of the court of appeals was filed on September 12, 1991. On December 12, 1991, Justice Stevens extended the time in which to file a petition for a writ of certiorari to and including January 10, 1992, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On August 6, 1990, the United States filed an *in rem* action in the United States District Court for the Northern District of Ohio seeking forfeiture of a 1985 Cadillac Fleetwood automobile and a 1989 Suzuki motorcycle. The complaint alleged that the vehicles were subject to forfeiture under 21 U.S.C. 881(a)(6) because they had been purchased with the proceeds of an exchange of controlled substances. The complaint alleged that the vehicles belonged to Michael Alexander, although title to the vehicles was held in the names of petitioners Robyn Price and Robert Carter. On July 20, 1990, according to the complaint, Alexander pleaded guilty to a single count of possession of approximately 720 grams of cocaine with the intent to distribute it.

Price and Carter filed claims to the defendant properties, and the government filed a motion for summary judgment. Pet. App. A8. In support of its motion, the government introduced evidence showing that between January 1985 and December 1989, Alexander had no legitimate source of income. In July 1989, Alexander went to a motorcycle dealership with petitioner Carter and selected the defendant motorcycle. Later, Alexander brought the motorcycle back to the dealership for servicing. Alexander is licensed to drive a motorcycle, but Carter is not. Pet. App. A12, A14.

The defendant Cadillac, to which petitioner Price, Alexander's cousin, held title, was purchased on June 21, 1988, with $8,175 in cash and a $6,000 bank check. In 1989, Alexander authorized the installation of a sound system. He also paid $2,000 for installation of a customized roof. Price was unable to describe the car, and it was not insured in her name. Although Price claimed to have paid for the Cadillac with her savings,

her tax returns for 1986, 1987, and 1988 showed a total taxable income for all three years of less than $25,000. Pet. App. A14-A15. Both the Cadillac and the motorcycle were found in parking spaces rented by Alexander. Pet. App. A13-A14.

2. On February 27, 1991, the district court granted the government's motion for summary judgment. Pet. App. A8-A20. The court found that the government had presented "ample evidence" to show probable cause to believe that the defendant vehicles were purchased with the proceeds of illegal narcotics activity. Pet. App. A18. The court found that Alexander exercised control over the vehicles, that Price's income and Carter's lack of a license for a motorcycle made it unlikely that they owned the vehicles, and that Alexander's only apparent source of income "is from the sale of narcotics." Pet. App. A18-A19. In addition, the court noted that "[n]either claimant has produced any evidence in support of their claims of ownership." Pet. App. A19.

Petitioners Price and Carter filed a notice of appeal, but they failed to seek a stay of the district court's order or to file a supersedeas bond. On March 22, 1991, the United States Marshal transferred the Cadillac Fleetwood to the Internal Revenue Service. On July 11, 1991, the Marshal sold the motorcycle for $2,900. Pet. App. A2.

3. On the government's motion, the court of appeals dismissed the claimants' appeal. Pet. App. A1-A4. The court held that "[c]ivil forfeiture proceedings are *in rem* proceedings and the court's subject matter jurisdiction is dependent on its continued control over the property." Pet. App. A2. The court concluded that its "jurisdiction over the appeal terminated with the transfer of the defendant vehicles from the control of the court." Pet. App. A3.

ARGUMENT

Petitioners contend (Pet. 11-15) that the court of appeals erred in dismissing their appeal from the district court's final judgment of forfeiture. Petitioners point to a conflict in the courts of appeals over whether removal of the *res* from the jurisdiction of the court deprives the court of jurisdiction in an *in rem* forfeiture proceeding.

On February 24, 1992, this Court granted certiorari in *Republic National Bank* v. *United States*, No. 91-767. That case presents the question whether removal of the *res* from the district in an *in rem* forfeiture proceeding deprives the court of appeals of jurisdiction. In *Republic National Bank*, the government filed an *in rem* action seeking the forfeiture of a single-family residence. While the case was pending in the district court, the house was sold and the proceeds were deposited with the United States Marshal. Following a bench trial, the district court issued a final judgment of forfeiture. The claimant appealed, but failed to file a supersedeas bond or seek a stay of the district court's judgment. The United States Marshal then transferred the proceeds of the sale of the house into the Asset Forfeiture Account of the United States Treasury. Because the *res* had left the court's territorial jurisdiction, the court of appeals dismissed the appeal.*

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* In addition to the court of appeals in this case, the Seventh, Ninth, and Eleventh Circuits adhere to the view that the presence of the *res* is a prerequisite to jurisdiction. See *United States* v. *$29,959*, 931 F.2d 549, 551 (9th Cir. 1991); *United States* v. *$10,000*, 860 F.2d 1511, 1513 (9th Cir. 1988); *United States* v. *Tit's Cocktail Lounge*, 873 F.2d 141, 143 (7th Cir. 1989); *United States* v. *One Lear Jet Aircraft*, 836 F.2d 1571 (11th Cir.) (en banc), cert. denied, 487 U.S. 1204 (1988) Four courts of appeals take the view that even after the departure of the *res* from the jurisdiction of the court, the

The *res* at issue in *Republic National Bank* was sold and the proceeds were deposited with the Marshal while the case was pending in the district court. Thus, the precise question presented in *Republic National Bank* is whether the transfer of money from the district where forfeiture was sought to the United States Treasury deprives the court of *in rem* jurisdiction. In this case, in contrast, the *res* at issue are vehicles rather than money. At least one court of appeals has suggested that this difference may affect the jurisdictional analysis. See *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991). In addition, at least one of the vehicles at issue in this case has been sold and has passed out of the control of the government. Consequently, even if the petitioner were to prevail in *Republic National Bank*, it is possible that the petitioners in this case would be entitled to no relief.

Despite these differences, the Court's decision in *Republic National Bank* may well have a bearing on this case. We therefore suggest that the Court hold the petition for a writ of certiorari in this case pending its decision in *Republic National Bank*.

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court retains *in personam* jurisdiction over the government and thus may order the government to return forfeited funds. *United States* v. *Aiello*, 912 F.2d 4, 7 (2d Cir.), cert. denied, 111 S. Ct. 757 (1990); *United States* v. *$95,945.18*, 913 F.2d 1106, 1109 (4th Cir. 1990); *United States* v. *$25,721.00*, 938 F.2d 1417, 1419 (1st Cir. 1991); *United States* v. *$12,390*, No. 90-2071 (8th Cir. Feb. 10, 1992). See also *United States* v. *$1,322,242.58*, 938 F.2d 433, 437-438 (3d Cir. 1991) (declining to apply the rule that the departure of the *res* from the jurisdiction of the court deprives the court of jurisdiction when the *res* is money).

CONCLUSION

The petition for a writ of certiorari should be held pending the Court's decision in *Republic National Bank* v. *United States*, cert. granted, No. 91-767 (Feb. 24, 1992), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

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